APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

COWLES PUBLISHING COMPANY,
Respondent.

No. 14,139

Jun. 28, 1954

Petition for Enforcement of Order of the National Labor Relations Board

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BEFORE: HEALY, BONE, and ORR, Circuit Judges

HEALY, Circuit Judge

In this case the primary finding of the trial examiner and of the National Labor Relations Board was that respondent violated §8(a) (1) of the Labor Management Act by discharging 16 of its employees for engaging in a concerted work-stoppage or strike. Respondent was ordered to reinstate the discharged employees with back pay from the date of their application for reinstatement, to post the customary notices, and to cease and desist from engaging in conduct violative of the Act.

Respondent publishes the Spokane Spokesman Review, a newspaper with a large Sunday edition. It

employed part-time "inserters," as they are called, to assemble the different sections of the Sunday paper. The inserters were not organized or members of any union. Most of them were local college students who worked an irregular number of hours which they were permitted to schedule largely at their own convenience. On each Saturday evening, however, they were required to work from six o'clock until all the Sunday papers were assembled, a task usually taking nine or ten hours. They were paid on the basis of a piece rate varying in proportion to the weight of the sections assembled. The precise rate for a given section was often unknown until after that particular section had been inserted.

It appears that this uncertainty of pay and a feeling that the total pay was inadequate, coupled with dissatisfaction over a shortage of locker room facilities, had been for some time a source of discontent on the part of the inserters. There is undisputed evidence that complaints as regards both the locker rooms and the smallness of the pay were several times brought to the attention of a Mr. Crooks, a day foreman for respondent. It appears, however, that the grievances had not been communicated to higher authorities. During 1952 the dissatisfaction was heightened when the organized mailers, who worked in the same room with the inserters, received a pay increase, whereas the unorganized inserters received none.

At an informal meeting of the inserters held on August 17 of that year a resolution specifying the grievances was drawn up by one of their number, Howard, demanding a pay increase of 20%, individual lockers, and the posting of respondent's standard for computing the piece rate. The resolution threatened economic pressure if the demands were not met. By the following Saturday, August 23, all the regular inserters had signed the resolution. At six o'clock that evening they decided to submit the resolution as soon as they began work at 6:15 and to strike at seven o'clock if their demands were not met. Pursuant to this decision Howard in company with another inserter handed the resolution to Munkers, acting foreman of the mailing room, and told him that a strike was planned for seven o'clock unless the demands stated in it were met. Munkers at once notified the assistant production manager, and the latter in turn telephoned Edmonds, the production manager for respondent, who ordinarily handled collective bargaining matters. Edmonds was at his home at the time. He and two other supervisory employees proceeded to the plant, arriving a little after seven o'clock. Meanwhile the inserters had stopped work at seven and had gathered in the locker room. They were asked by Munkers to stand by, as Edmonds would shortly be ready to see them. A few minutes later Munkers told them that if any of them wanted their jobs back they should go upstairs one at a time and talk to Edmonds. However,

the inserters presented themselves to Edmonds in a body.

The meeting apparently lasted but a few minutes, and Edmonds did the talking. He termed the inserters' action unprecedented, commented on the shortness of the notice and the consequent lack of time on the part of respondent to consider the demands, and suggested that an immediate decision thereon was not possible. He concluded by saying that respondent "could not do business that way," that there was but one alternative, and that "you gentlemen are all through." Edmonds had been seated during his remarks, but at this juncture he stood up and all present departed. The witnesses describing this occurrence did so in varying terms, but there was no important variation in the substance of their accounts of it. Nor is there any substantial dispute on respondent's part as to what Edmonds said.

Respondent was able to get its paper out that night only by calling upon former inserters, others of its employees, and employees of another plant. During the ensuing week it began hiring replacements for the striking inserters, completing this task sometime prior to Friday, August 29. On that day Howard, speaking for all the strikers, asked Edmonds to reinstate them. The request was denied on the ground that all had been replaced.

Respondent's contentions are (1) a half-hearted claim that the inserters were not in fact discharged, and (2) that, if discharged, their work-stoppage was an unprotected activity inasmuch as their plans had not been disclosed a sufficient time beforehand, and because they chose to strike under circumstances which would put respondent under the maximum of pressure.

The record abundantly supports the finding that the inserters were discharged, and that that action was taken because they had gone on strike. Moreover it is plain that the discharges occurred approximately an hour after the strike began and some days prior to the inserters' being permanently replaced. Further, there is no dispute that the strike was in support of specified demands for a raise in pay and for improved working conditions, submitted to the employer prior to striking.

It is settled law in this circuit that an employer is at liberty to replace employees who engage in a concerted work stoppage for economic objectives. But it is equally settled that he may not, prior to replacing the employee, *discharge* him for engaging in such activity. NLRB v. Globe Wireless, 9 Cir., 193 F. 2d 748, and authorities cited; NLRB v. Buzza-Cardozo, 9 Cir., 205 F. 2d 889, cert. denied 346 U. S. 923. Accordingly unless for the reasons advanced by respondent the strike here falls outside the area of concerted activity for mutual aid and protection, the finding of the Board

that respondent violated §8(a) (1) of the Act was appropriate.

We see no ground for believing that the shortness of the notice given by the inserters and the precipitate action thereafter taken by them renders their strike unprotected. In *Globe Wireless,* supra, the employees involved were held protected from discharge even though, as was true in that instance, they had stopped work before their grievances were presented. The case before us is not one where a strike was had in repudiation of a contract not to strike, nor was it a wildcat strike, or an attempt by the employees unilaterally to prescribe their own working conditions, as was the situation in the cases relied on by respondent.

We may add that had Edmonds, instead of summarily discharging these men, merely warned them that respondent would permanently fill their places in event they continued the strike, he would have been on safe ground.

Respondent objects to the breadth of paragraph 1(b) of the Cease and Desist Order, which reads:

"1. Cease and desist from:

. . . .

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the pur-

pose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(3) of the Act."

We agree that in the circumstances of this case the paragraph is unjustifiably broad, and to that extent the Board's order is modified. Cf. Labor Board v. Express Publishing Co., 312 U. S. 426. Paragraph (a) would seem to sufficiently cover the matter.

Decree will be entered enforcing the order as modified.

BONE, Circuit Judge dissenting.

I would deny enforcement of the Board's order as it was modified by the majority.

The unusual facts shown by the record in this case clearly indicate that an abrupt demand for a wage increase was first made by the inserters on certain minor employees of respondent then engaged in and about respondent's plant. The demand was carefully timed to come at an hour on late Saturday evening when these minor employees faced the necessity of then getting out the Sunday edition of the paper to meet certain time schedules. The demand was in the form of

an ultimatum—"grant us the demanded raise at once or get the papers out anyway you can."

As the prevailing opinion points out, an employee (Edmonds) who ordinarily handled collective bargaining matters was then called from his home, arriving after the inserters had stopped work at 7:00 p. m. Some colloquy then ensued, but nothing in the record suggests that Edmonds possessed authority to summarily grant the demanded raise without any consultation with the owners of the newspaper. The fact that even the opportunity for such a consultation was completely foreclosed by the terms of the wage demand, is a circumstance which seems to have absolutely no significance in the eyes of the Board officials.

Much in the way of fulsome praise of the "collective bargaining" procedure has appeared in court comments and in articles by those friendly to organized labor. But the circumstances here presented clearly indicate that the time element made "bargaining" of any sort an utter impossibility. The inserters made abundantly plain that they wanted no palaver over the matter of compensation; that so far as they were concerned, the Sunday issue of the paper could remain in the plant. The action of the Board officials indicates that they thought this course was eminently proper. If the theory is sound, every railroad union in America could meet, formulate a general demand for higher compensation throughout the nation, and give the rail-

roads five minutes notice to meet the demand or all trains would cease to move. Responsible labor groups do not "bargain" in that fashion.

It is not amiss to point out that a week (or even less) of "negotiations" through official channels might have been quite sufficient to bring about an amicable adjustment of the instant wage demand, and it cannot be doubted that any raise of pay which resulted could have been made retroactive to cover the Saturday work and future work. The action of the inserters, along with that of the Board, made impossible such a reasonable solution. The least that can be said about this suggestion is that it would have ended this tempest in a teapot.

The incontinent haste which characterizes every aspect of this very unusual proceeding is not calculated to add dignity to Board proceedings or encourage collective bargaining. It justifies application of the pointed and pertinent remarks of the Fifth Circuit appearing in the first two paragraphs of the opinion in N. L. R. B. v. Roscoe Skipper, Inc., No. 14,885, June 18, 1954.

(Endorsed:) Opinion and Dissenting Opinion. Filed Jun. 28, 1954. Paul P. O'Brien, Clerk.

DECISION AND ORDER

On April 24, 1953, Trial Examiner Martin S. Bennett issued his Intermediate Report in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. The Trial Examiner found, further that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint, and recommended dismissal of those allegations of the complaint. Thereafter, the General Counsel and Respondent filed exceptions to the Intermediate Report and supporting briefs.

The Board[1] has reviewed the rulings made by the Trial Examiner and finds that no prejudicial error was committed. The rulings are hereby affirmed.[2] The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case and hereby adopts the findings, conclusions, and

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[1]Pursuant to the provisions of Section 3 (b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

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[2]The Respondents' request for oral argument before the Board is hereby denied, inasmuch as the record, including the exceptions and briefs, adequately presents the issues and the positions of the parties.

recommendations of the Trial Examiner with the following modifications:

In agreement with the Trial Examiner, and for the reason detailed in the Intermediate Report, we find that the Respondent discharged the striking inserters on August 23, 1952, thereby violating Section 8 (a) (1) of the Act.

THE REMEDY

The Trial Examiner, in Section V of the Intermediate Report, recommended the back pay for the inserters be computed from the date of their discriminatory discharge on August 23, 1952, rather than from August 29, when they applied for reinstatement. Under ordinary circumstances, an employee who is discharged in violation of the Act is awarded back pay from the date of the discharge, and not from the date he applies for reinstatement. However, where, as in this case, employees are discriminatorily discharged while engaged in a strike, it is the Board's practice to award back pay from the date of the dischargees' unconditional request for reinstatement, rather than from the date of discharge, as their loss of wages cannot conclusively be attributed to their discharge until the employees indicate their willingness to abandon the strike.[3] The Trial Examiner did not follow this prac-

[3]Kallaher & Mee, Inc., 87 NLRB 410, 413

tice in the instant case, but awarded back pay from the date of discharge of the inserters on August 23, rather than from August 29, the date they sought reinstatement. In so doing, the Trial Examiner cited the absence of any evidence in the record that the inserters remained on strike after their discharge. However it is clear that the inserters did not work for the Respondent during the period from August 23 to 29 and there is no evidence that they accepted other employment of any kind, or that they took themselves entirely out of the labor market. Nor is there any evidence that prior to August 29, 1952, they abandoned the demands for which they had struck on August 23. Under these circumstances, we find that the strike continued until August 29 and we will in conformity with our usual practice, compute back pay from August 29, instead of August 23.

ORDER

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that Respondent, Cowles Publishing Company, Spokane, Washington, its officers, agents, and successors, and assigns, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing its employees in the exercise of the right to present grievances and to engage in concerted activities for mutual aid or protection.

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (3) of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Offer to the 16 employees named in Appendix A, attached to the Intermediate Report, save Orval Dean, immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges.

(b) Make whole the aforesaid 16 employees for any loss of pay they may have suffered by reason of

Respondent's discrimination against them, in the manner set forth in the section entitled "The Remedy," in the Intermediate Report and Decision herein.

(c) Upon request, make available to the Board or its agents for examination or copying all payroll, social security, and personnel records necessary to analyze the amounts of back pay due under the terms of this Order.

(d) Post at its plant at Spokane, Washington, copies of the notice attached to the Intermediate Report as Appendix A.[4] Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by Respondent's authorized representative, be posted immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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[4]This notice shall be amended by substituting for the words "The Recommendations of a Trial Examiner," the words "A Decision and Order." If this Order is enforced by a decree of a Circuit Court of Appeals, the notice shall be further amended by substituting for the words "Pursuant to a Decision and Order" in the caption, the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

(e) Notify the Regional Director for the Nineteenth Region in writing, within ten (10) days from the date of this Order, what steps Respondent has taken to comply herewith.

It Is Further Ordered that the complaint be dismissed insofar as it alleges that Respondent has refused to bargain collectively with the representatives of its employees.

Signed at Washington, D. C., August 20, 1953.

JOHN M. HOUSTON, Member.

PAUL L. STYLES, Member.

IVAR H. PETERSON, Member.

(Seal) NATIONAL LABOR RELATIONS BOARD.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

COWLES PUBLISHING COMPANY,
Respondent.

No. 14139

ORDER STAYING ISSUANCE OF MANDATE

Upon application of A. W. Witherspoon, Esq., counsel for the Respondent, and good cause therefor appearing, IT IS ORDERED that the issuance, under Rule 26 of the mandate of this Court in the above cause be, and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the 20th day of September, 1954, herein, providing such petition is filed in the clerk's office of the Supreme Court of the United States on or before September 20, 1954. In the event the petition for writ

of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

WILLIAM HEALY,
United States Circuit Judge.

Dated: San Francisco, Calif.
August 10, 1954.

(Endorsed)
Filed: August 10, 1954.
PAUL P. O'BRIEN, *Clerk.*

The pertinent provisions of the National Labor Relations Act (61 Stat. 140, 146, 147, 65 Stat. 601, 29 U. S. C. (Supp. V), §157, 158, §160(c), 29 U. S. C. A. §157, 158, §160(c)) are as follows:

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a) (3).

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 * * *."

"Sec. 10. * * *

*

"(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or

is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: * * *. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. *No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.* * * *"

(Italics supplied in last sentence.)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
COWLES PUBLISHING COMPANY,
Respondent.
No. 14,139

DECREE ENFORCING AN ORDER AS MODIFIED OF THE NATIONAL LABOR RELATIONS BOARD

Before: HEALY, BONE AND ORR, *Circuit Judges.*

This cause came on to be heard upon the petition of the National Labor Relations Board to enforce its order dated August 20, 1953. The Court heard argument of respective counsel on June 3, 1954, and has considered the briefs and the transcript of record filed in this cause. On June 28, 1954, the Court, being fully advised in the premises, handed down its decision enforcing as modified the said order. In conformity therewith it is hereby

ORDERED, ADJUDGED AND DECREED that the Respondent, Cowles Publishing Company, Spo-

kane, Washington, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing its employees in the exercise of the right to present grievances and to engage in concerted activities for mutual aid or protection.

2. Take the following affirmative action, which the Board has found will effectuate the policies of the National Labor Relations Act, as amended (hereinafter referred to as the Act).

(a) Offer to the 16 employees named in Appendix A, attached hereto, save Orval Dean, immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges.

(b) Make whole the aforesaid 16 employees for any loss of pay they may have suffered by reason of Respondent's discrimination against them in the manner set forth in the section entitled "The Remedy," in the Intermediate Report of the Trial Examiner of the National Labor Relations Board dated April 24, 1953, and Decision of the Board dated August 20, 1954.

(c) Upon request, make available to the Board or its agents for examination or copying all payroll, so-

cial security, and personnel records necessary to analyze the amounts of back pay due under the terms of this Decree.

(d) Post at its plant at Spokane, Washington, copies of the notice attached hereto as Appendix A. Copies of said notice, to be furnished by the Regional Director of the National Labor Relations Board for the Nineteenth Region, Seattle, Washington, shall, after being duly signed by Respondent's authorized representative, be posted immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify aforesaid Regional Director in writing, within ten (10) days from the date of this Decree, what steps Respondent has taken to comply herewith.

(Endorsed)
Decree Filed and Entered September 7, 1954.

/s/ PAUL P. O'BRIEN,
Paul P. O'Brien, Clerk.

A True Copy.
Attest:

Paul P. O'Brien, Clerk.

APPENDIX A

NOTICE TO ALL EMPLOYEES

Pursuant to

A Decree of the United States Court of Appeals enforcing as modified an order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of the right to present grievances and to engage in concerted activities for mutual aid or protection.

WE WILL OFFER the employees named below immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed and make them whole for any loss of pay suffered as a result of the discrimination against them.

THOMAS P. HOWARD	ERNEST P. CAGLE
FRANK CASTAGNA	JAMES DREIS
C. EDWIN ELKINS	CLAYTON H. ELLIS
GEORGE GRADER	HAROLD J. HIMMELSBACH
JAMES S. HOGAN	PHILLIP M. O'NEILL
JOSEPH PEDERSEN	W. STANLEY RIDDLE, JR.
ORVIN TJOSTOLVSON	GEORGE WEBER

GEORGE PETERSON

WE WILL make whole ORVAL DEAN for any loss of pay suffered as a result of the discrimination against him.

All our employees are free to become, remain, or refrain from becoming or remaining members of any labor organization.

COWLES PUBLISHING COMPANY
(Employer)

Dated_____

By_____
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 353

COWLES PUBLISHING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. pp. i-ix) is reported at 214 F. 2d 708. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 23-57)[1] are reported at 106 NLRB No. 131.

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[1] In conformity with the Petition, references designated "R." are to the record in the court below. References preceding a semi-colon are to the Board's findings; succeeding references are to the supporting evidence.

JURISDICTION

The decision of the court below (Pet. pp. i-ix) was issued on June 28, 1954. A petition for rehearing, filed on July 17, 1954, was denied on August 3, 1954. The petition for writ of certiorari was filed on September 18, 1954. The jurisdiction of this Court is invoked under 28 U.S.C 1254(1), and under Section 10(e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Whether employees who went on strike during their working shift in support of lawful economic demands were engaged in a concerted activity for mutual aid or protection within the meaning of the Act.

2. Whether the Board properly found that petitioner violated the Act in discharging the employees who participated in the strike.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), in addition to those set forth in the Appendix to the petition, pp. xviii-xix, are as follows:

LIMITATIONS

Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede

or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

STATEMENT

I

The Board's findings of fact

The Board found that the Company violated Section 8(a)(1) of the Act by discharging 16 of its employees for engaging in a concerted work stoppage. The subsidiary facts upon which these findings rest may be summarized as follows:

The Company publishes a newspaper with a large Sunday edition (R. 76). It employed part-time "inserters" to assemble the different sections of this edition (R. 32; 76-77). All of them were required to work every Saturday evening from six o'clock until all the Sunday papers were finally assembled, usually 9 or 10 hours later (R. 32, 33; 183, 184, 117).

The inserters were paid on the basis of a piece rate which varied in proportion to the weight of the sections assembled (R. 32; 119). However, the precise rate for a given section was often unknown to the inserters until after that particular section had been inserted (R. 35; 119, 195). This uncertainty of pay and a feeling that the total pay was inadequate, coupled with dissatisfaction over a shortage of locker room facilities, constituted a continual source of discontent on the part of the inserters (R. 34-35; 189-195, 197, 118-119). The em-

ployees repeatedly complained to the Company's supervisors about these matters, but the Company did nothing to remedy them (R. 197, 120-121, 156, 332, 367). The inserters' dissatisfaction was heightened when the organized mailers, who worked in the same room as the inserters, received a pay increase, whereas the unorganized inserters received none (R. 35; 121-123, 190-191, 137-138, 184, 270).

On the evening of Saturday, August 16, 1952, the inserters assembled a particularly heavy edition, the piece rate assigned to which the inserters deemed inadequate (R. 35; 194-196). During the following week, the inserters drafted and signed a resolution demanding a 20 percent pay increase, individual lockers, and the posting of the Company's standard for computing the piece rate (R. 35-37; 194-199, 124-125, 275-277). The resolution ended by threatening economic pressure if the demands were not met (R. 36-37; 275-276).

The following Saturday, August 23, the inserters decided to submit the resolution to the Company as soon as they began work at 6:15 and to strike at 7 o'clock unless their demands were met (R. 37-38; 199-202, 125-127). Accordingly, the inserters handed the resolution to their foreman and informed him that a strike was planned for 7 o'clock unless the demands contained in the resolution were met (R. 38-39; 188, 202-204, 127-128, 159-160,

317-318). The foreman got word to Edmonds, the production manager who ordinarily handles collective bargaining matters for the Company, at his home (R. 39; 74, 79-81, 317).

At 7 o'clock the inserters ceased work and gathered in the locker room (R. 39-40; 207-209, 129). At about 7:40 the employees were told that "if any of you men want your jobs back, go upstairs and talk to Edmonds and do it one at a time" (R. 40; 210, 130, 397-398). The employees presented themselves in a body to Edmonds and the other supervisors who had come down to the plant (R. 40-41; 211-212, 85-86, 88). Edmonds described their action as "unprecedented," criticized the short notice they had given the Company, and declared that the Company could "not do business that way" (R. 41; 212-213, 132). Asserting that the Company had "no other alternative," he concluded by informing the inserters, "Consequently, you gentlemen are all through" (R. 41; 213, 132, 250, 398, 409, 422, 429).

By calling upon former inserters, other Company employees, and employees of another concern, the Company was able to get its paper out that night (R. 41-42; 301, 362-363). The next week the Company began to fill the jobs of the discharged strikers, and completed this some time prior to August 29 (R. 42; 301-302, 373). On that day, the strikers sought reinstatement, but the Company refused on the ground that their jobs had been filled (R. 42-43; 216-217, 110, 134, 238-239, 372-373).

II

The Board's conclusions and order

On the basis of the foregoing facts, the Board found (R. 46-47) that the inserters had engaged in an economic strike on August 23 and that, by discharging them for striking, the Company violated Section 8(a)(1) of the Act. The Board ordered the Company to cease and desist from the unfair labor practices found, or from in any other manner interfering with the rights guaranteed the employees by Section 7 of the Act; to reinstate the inserters (except one not desiring reinstatement) with back pay from the date of their application for reinstatement; and to post appropriate notices (R. 26-27, Pet. pp. xii-xv).

III

The decision of the court below

The court below, sustaining the Board's findings and conclusions, held (one judge dissenting) that by going on strike to support specified demands for better wages and working conditions, submitted to the employer prior to striking, the inserters engaged in concerted activity for mutual aid and protection within the meaning of Section 7 of the Act, and that their discharge for participating in such activity, before their jobs had been filled, violated Section 8(a)(1) (Pet. pp. v-vi). Rejecting the Company's contention that the work stoppage was, in the circumstances, outside the protection of the Act, the court stated (Pet. p. vi):

> We see no ground for believing that the shortness of the notice given by the inserters and the precipitate action thereafter taken by them renders their strike unprotected. In *Globe Wireless,* [193 F. 2d 478 (C. A. 9)], the employees involved were held protected from discharge even though, as was true in that instance, they had stopped work before their grievances were presented. The case before us is not one where a strike was had in repudiation of a contract not to strike, nor was it a wildcat strike, or an attempt by the employees unilaterally to prescribe their own working conditions, as was the situation in the cases relied on by respondent.

The court enforced the Board's order with modifications not relevant here.

ARGUMENT

The holding of the court below, that the striking employees were engaged in "concerted activities * * * for * * * mutual aid or protection" within the meaning of Section 7 of the Act and that petitioner violated the Act in discharging them, is manifestly correct, accords with an unbroken line of circuit court authorities, and presents no issue warranting review.[2]

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[2] See *National Labor Relations Board* v. *Kennametal, Inc.*, 182 F. 2d 817, 819 (C.A. 3); *Olin Industries, Inc.* v. *National Labor Relations Board,* 191 F. 2d 613, 615-616 (C.A. 5),

The Company's claim (Pet. 10-11) that the employees forfeited the protection of the Act because they struck on short notice "right in the middle of the job when the papers were coming from the press" finds no support in the statute or the authorities. The protection of the Act is not lost merely because employees go on strike when they can exert a maximum of economic pressure upon the employer. Each side in a strike is free to select the most opportune moment for advancing or resisting labor demands and nothing in the Act suggests that, in the absence of contractual restrictions, the right to strike, which is broadly guaranteed by the statute (Section 13), must be so exercised in point of time as to minimize its effect upon the employer.[3]

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certiorari denied, 343 U.S. 919; *Gullett Gin Co.* v. *National Labor Relations Board*, 179 F. 2d 499, 501-502 (C.A. 5); *National Labor Relations Board* v. *Southern Silk Mills, Inc.*, 209 F. 2d 155, 210 F. 2d 824 (C.A. 6), certiorari denied, 347 U.S. 976; *Carter Carburetor Corp.* v. *National Labor Relations Board*, 140 F. 2d 714, 717-718 (C.A. 8); *Modern Motors, Inc.* v. *National Labor Relations Board*, 198 F. 2d 925, 926 (C.A. 8); *National Labor Relations Board* v. *J. I. Case Co.*, 198 F. 2d 919 (C.A. 8), certiorari denied, 345 U.S. 917; *Kitty Clover, Inc.* v. *National Labor Relations Board*, 208 F. 2d 212, 215 (C.A. 8); *National Labor Relations Board* v. *Globe Wireless, Ltd.*, 193 F. 2d 748, 750 (C.A. 9); *National Labor Relations Board* v. *Buzza-Cardozo*, 205 F. 2d 889, 890 (C.A. 9), certiorari denied, 346 U.S. 923.

[3] *Cf. National Labor Relations Board* v. *Kennametal, Inc.*, 182 F. 2d 817, 818 (C.A. 3); *Carter Carburetor Corp.* v. *National Labor Relations Board*, 140 F. 2d 714, 717-718 (C.A. 8); *Modern Motors, Inc.* v. *National Labor Relations Board*, 198 F. 2d 925 (C.A. 8); *Kitty Clover, Inc.* v. *National Labor Relations Board*, 208 F. 2d 212, 215 (C.A. 8); *National Labor*

Contrary to petitioner's assertion (Pet. 11-15), the decision below in this respect is not in conflict with the decisions of this Court in *International Union* v. *Wisconsin Employment Relations Board,* 336 U.S. 245, or *National Labor Relations Board* v. *Local Union No. 1229,* 346 U.S. 464. The strike here was in traditional form. It cannot be assimilated either to the intermittent work stoppages for unstated ends involved in the first case or to the disloyal attack upon the employer in the second case which "related itself to no labor practice of the company [and] made no reference to wages, hours, or working conditions."

Once it is recognized, as the court below properly held, that the strike was a protected activity, petitioner's additional contentions (Pet. 13, 17, 19-21) that it discharged the employees because their action disrupted its business operations rather than in reprisal for striking and that the Board had failed to rebut this defense must also be rejected. For where, as here, the discharge arises from the

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Relations Board v. *Globe Wireless, Ltd.*, 193 F. 2d 748, 750 (C.A. 9).

Both the Board and the courts have recognized that strikers may lose the statutory protection where in stopping work they fail to take reasonable precautions, or fail to give the employer an adequate opportunity, to protect the employer's physical plant from such imminent danger as foreseeably would result from a sudden cessation of work. *E.g., Marshall Car Wheel and Foundry Co.*, 107 NLRB No. 100; *Albrecht* v. *National Labor Relations Board,* 181 F. 2d 652 (C.A. 7). There is no suggestion in the record here, nor does petitioner assert, that the work stoppage jeopardized the safety of its operations or equipment.

employees' exercise of a protected right "an employer's protestation that he did not intend to encourage or discourage [union or concerted activities] must be unavailing where a natural consequence of his action was such encouragement or discouragement." *Radio Officers* v. *National Labor Relations Board,* 347 U.S. 17, 45. Obviously, a natural consequence of petitioner's action in discharging the strikers was to discourage the exercise of the right to strike in support of lawful economic demands.

Petitioner further suggests (Pet. 17-18) that it is "unrealistic" to view the discharge of the strikers as illegal because, instead of discharging them, it could have just as effectively, and lawfully, terminated their employment merely by replacing them, as it did, prior to their unconditional request for reinstatement. The suggestion overlooks the important consideration that although an employer confronted with an economic strike is free to hire permanent replacements for the strikers in order to conduct his business (*National Labor Relations Board* v. *Mackay Radio & Telegraph Co.,* 304 U.S. 333, 345), he may not engage in reprisals against employees for exercising a right guaranteed by the Act. The discharge of employees for engaging in a strike constitutes such a prohibited reprisal and it has uniformly been recognized that the employer in that situation must reinstate the strikers upon application, dismissing, if necessary, employees

hired to replace the strikers, as here, *after* the unlawful discharge.[4]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER, 1954.

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[4] *E.g., National Labor Relations Board* v. *Remington Rand, Inc.*, 130 F. 2d 919, 928 (C.A. 2); *National Labor Relations Board* v. *Southern Silk Mills, Inc.*, 209 F. 2d 155, 210 F. 2d 824 (C.A. 6), certiorari denied, 347 U.S. 976; *National Labor Relations Board* v. *United States Cold Storage Corporation*, 203 F. 2d 924, 927 (C.A. 5), certiorari denied, 346 U.S. 818; *National Labor Relations Board* v. *Globe Wireless, Ltd.*, 193 F. 2d 748, 750 (C.A. 9); *National Labor Relations Board* v. *Buzza-Cardozo*, 205 F. 2d 889, 890 (C.A. 9), certiorari denied, 346 U.S. 923.

We do not read this Court's decision in *National Labor Relations Board* v. *Rockaway News Supply Co.*, 345 U.S. 71, 74-75, to reject the distinction between replacement and discharge in the context of this case. The Court there thought that the distinction as applied to the particular facts of that case was unreasonable.

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